United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-7203

ORIGINAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Civil Action No. 76-7203

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Plaintiffs-Appellants,

v.

HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK, and ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,

Defendants-Appellees.

On appeal from the United States District Court for the Southern District of New York

PETITION FOR REHEARING IN BANC

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PETITION FOR REHEARING IN BANC

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National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, plaintiffs-appellants herein, respectfully petition this Court for a rehearing in banc of its decision decided March 18, 1977 in the above-entitled case.

I.

PRELIMINARY STATEMENT

Appellants brought this suit challenging regulations promulgated by the Commissioner of the New York State Department of Health (herein "Commissioner") which in effect "froze" Medicaid rate reimbursement to health care institutions in the State at the levels established for the year 1975. The

regulations were attacked by the appellants as being in conflict with Title 19 of the Social Security Act and the regulations issued thereunder and with the Labor-Management Relations Act, as amended ("LMRA").

The District Court dismissed the complaint holding that the appellants lack standing to raise the challenge under the Social Security Act and that the complaint failed to state a claim upon which relief could be granted with respect to the cause of action under the LMRA.

On appeal, Judges Van Graafeiland and Meskill affirmed the lower court. Judge Mansfield dissented, it being his opinion that appellants had standing to attack the regulation in question on the grounds that "(1) it precludes payment of 'reasonable' costs (which includes wages) as that term is used in the Social Security Act, 42 U.S.C. § 1396a (a) (13) (D); and (2) it places an undue burden upon the right of non-profit health facility employees to bargain collectively as authorized by the Labor-Management Relations Act, 29 U.S.C. §§ 151, et seq."

II.

THE PETITION FOR REHEARING IN BANC SHOULD BE GRANTED

a. Reasons For Granting Rehearing

Appellants urge that the petition for a rehearing

in banc be granted for the following reasons:

1. The majority opinion misconstrues and misapplies recent Supreme Court decisions which have expanded the concept of standing. By their decision the majority have precluded an effective challenge to the New York Regulation and have thus condemned workers in the health care industry in New York State who number in the hundred of thousands to "sweat shop or substandard wages".

2. In deciding against the appellants on the merits with respect to their claim under the LMRA, the majority decision is not only in conflict with the reasoning of several recent opinions by the Supreme Court and other Circuit Courts, but also nullifies bona fide collective bargaining in this State in the health care industry. The result means that strike activity is the sole alternative available to Unions representing employees in the health care industry which is contrary to the intent of Congress in passing the health care amendments to the LMRA. By including hospitals under the coverage of that Act, Congress was attempting to provide for the settlement of labor disputes in the health care field without the disruption of patient care.

3. The decision is thus of extraordinary importance in a most sensitive industry. The opinion will not be limited in its devastating impact to the State of New York.

Other states will undoubtedly follow the lead of New York and pass similar restrictions aware that this Court has precluded any attack on such regulations by Unions, the only parties who have the desire to challenge such restrictions on their right to bargain collectively. In addition, other courts will likewise be influenced by this decision when analogous issues are presented to them.

b. Appellants Do Not Lack Standing To Challenge The New York Regulation As Being In Conflict With The Social Security Act

The majority opinion does not dispute the existence of constitutional standing or that the appellants, as representatives of the employees employed in health care institutions, would have the right to any standing enjoyed by the employees. See Flast v. Cohen, 392 U.S. 83; Sierra Club v. Morton, 405 U.S. 727, 739; Warth v. Seldin, 422 U.S. 490, 511. The majority however, relying primarily on Singleton v. Wulff, 96 S. Ct. 2868, held that appellants were not granted standing under the Federal Medicaid Statutes and Regulations to challenge the regulation promulgated by the Commissioner. The Court thus apparently decided that as a prudential matter the appellants were not the proper proponents to assert the challenge.

In so ruling the majority has ignored pertinent Federal regulations promulgated pursuant to the Social Security Act which indicate that appellants are indeed within

"the zone of interests" to be protected and has misread the implications of the Singleton case to deny standing to the only party interested in mounting a serious challenge to the regulation.

The majority assert that the statutory and constitutional rights which appellants were seeking to assert "are solely those of the homes". (Decision, p. 2417). However this ignores the significance of 20 C.F.R. 405.402 (a) which provides that:

> "[A]ll necessary and proper expenses of an institution in the production of services, including normal standby costs, are recognized."

Without question freely negotiated wage increases are a necessary and proper expense of an institution. Thus it is clear as the dissent points out, that the interests asserted by the appellants are "arguably" within the regulated or protected zone under the Statute and Regulations.

As Judge Mansfield cogently noted in his dissent at page 2424:

> "The employees, who are the persons actually engaged in rendering the essential services (as distinguished from providing or patronizing the facilities), have an equal if not greater interest than their employers or their patients in the interpretation of Title XIX, and particularly of the term 'reasonable' as used in § 1936a(a)(13)(D)[sic]. It is the employees, not the hospitals, providers of patients, who render the health services and are the ultimate recipients of

> the funds being paid and reimbursed under the Program, with the hospitals acting for the most part merely as conduits. The jobs, wages and likelihood [sic] of most health service employees depend directly upon the reimbursement provisions of the Program, without which most providers could not employ them. On the other hand, since the employer is reimbursed under the Program, he is not as much concerned with increasing his employees' compensation to a reasonable level as are his employees. Since the employer will suffer from paying substandard wages only if his employees engage in a work stoppage or if the compensation is insufficient to attract competent help, he has little incentive to challenge a regulation such as § 86.21(k), whereas the employees have a very real and direct concern."

Assuming however that appellants are in fact asserting the rights of some third party, they fall within the principles enunciated in Singleton v. Wulff, supra, permitting such standing under the circumstances which exist in this case. Again, to quote from the dissent of Judge Mansfield which sets forth the reasons appellants in this case are in an analogous position with the physicians granted standing in Singleton to assert rights of their patients:

> "The employers and their employees constitute a close, mutually interdependent relationship similar to that of the physician and patient in Singleton, and §86.21(k) constitutes a 'direct interference' with that relationship by preventing the employer from paying reasonable wages that will avoid a strike or work stoppage. The employers, furthermore, like the patients there, have little or no incentive to sue."

c. Appellants' Claim That The New York Regulation Interferes With And Restrains Bona Fide Collective Bargaining In The Health Care Industry In Violation Of The Supremacy Clause Sets Forth A Claim Upon Which Relief Can Be Granted

Congress, in amending the LMRA to include hospitals within its coverage, expressed its clear intention that collective bargaining in the health care industry be governed by federal law. Congress was well aware that state legislation would have to yield to paramount federal policy and that the new legislation will pre-empt the field. (See 120 Cong. Rec. H.4592, 4597-99, S.6942, S.6991, S.12104, S.12105 (Daily Eds. May 2, 7, 30; July 10, 1974). Indeed the House defeated an amendment by Representative Quie which would have preserved from pre-emption existing state laws which pertain to labor relations in the health care industry. (See 120 Cong. Rec. H.4599 (Daily Ed. May 30, 1974).

The general objective of the LMRA is to promote the free flow of commerce and industrial peace by encouraging the parties to resolve disputes through collective bargaining rather than by work stoppages. (See LMRA, § 1(b) 29 U.S.C. § 141(b)). Congress in amending the LMRA to bring within its coverage almost all health care institutions was well aware of the sensitive nature of the industry and the responsibility of both unions and employers to make special efforts to peacefully resolve their disputes without interruption of vital health care to the

patients. That is why Congress provided for special notice provisions and a very prominent role to be played by the Federal Mediation and Conciliation Service. (See §§ 8(d); 8((g); and § 213 of the LMRA, 29 U.S.C. § 158(d); § 159(g); and § 183).

Free and unfettered collective bargaining cannot function if the state will give absolutely no effect to the results of such bargaining. The state regulation is thus irreconcilable with federal law and is null and void. The majority opinion evades this issue by making a political pronouncement to the effect that the appellants' position would lead to "financial chaos". Judge Mansfield's dissent effectively disposes of this argument by noting that it completely ignores the limit imposed by 42 U.S.C. § 1396(a) which restricts reimbursement to "reasonable" costs. The majority decision in effect permits the states to determine what is reasonable even if that results in substandard wages and working conditions.

Recent decisions of the Supreme Court and other Appellate Courts reaffirm that state law may not interfere with or impede rights guaranteed by the LMRA. The United States Supreme Court held in Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 Sup. Ct. 2548 that the State of Wisconsin could not prohibit a union's concerted refusal to work overtime

during negotiations for a new contract. The Court reasoned that:

> "[S]tate attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB: '[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the state'." Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 96 Sup.Ct. at p. 2559.

The Third Circuit faced with a situation analogous to the instant case, has held that a complaint alleging interference by New Jersey State officials in the collective bargaining process between unions and various transit companies by threatening to withdraw state subsidies from any transit company which provided in its collective bargaining agreement for an uncapped cost-of-living clause or for a wage increase higher than that given to state employees stated a cause of action. Amalgamated Transit Union, Division 819 v. Byrne, - , 94 LRRM 2768 (C.A.3, 1977). In its decision the Court made the following pertinent comment:

> "The power and authority of a state, therefore, may not be invoked to disturb the balance of bargaining power existing between negotiating parties, nor may it be used in an effort to dictate the substantive terms of a collective bargaining agreement." 94 LRRM at p. 2771.

In another recent decision the Eighth Circuit held

that the State of Minnesota could not impose obligations upon an employer to fully fund an employee Pension Plan when the employees were terminated upon the closing of the employer's business, since such an obligation was contrary to the terms of the collective bargaining agreement. The Court decided that a state could not "attempt to influence the substantive terms of collective bargaining agreements by regulating the conduct of the parties to collective bargaining negotiations". White Motor Corp. v. Malone, 545 F.2d 599, 606 (C.A.8, 1976).

The state in this case has sought to intrude in an area pre-empted by federal law. Therefore the Medicaid freeze regulations are an invalid exercise of state authority, in that they interfere with free collective bargaining. A freeze on increases in payments of services is in effect a freeze on wages, which impedes the federal procedure for free and bona fide collective bargaining.

CONCLUSION

For all of the reasons set forth above, and in the papers previously submitted and on file with this Court, the petition of the appellants for a rehearing in banc should be granted.

Respectfully submitted,

SIPSER, WEINSTOCK, HARPER, DORN
& LEIBOWITZ
Attorneys for Appellants

Of Counsel:
RICHARD DORN

CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

Richard Dorn
Attorney for Appellants

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
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~~XXXXXXX~~ Civil Action
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NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, et al.,

Plaintiffs-
Appellants,

against

HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK, et al.,

Defendants-
Appellees.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th Street, New York, N.Y. 10024.

That on April 1, *19* 77 *deponent served the annexed*

PETITION FOR REHEARING IN BANC

on Hon. Louis J. Lefkowitz, Attorney General of State of New York
attorney(s) for Defendants-Appellees
in this action at Two World Trade Center, New York, N.Y. 10047 ies
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 1st day of April, 1977.

August DeFonse

The name signed must be printed beneath

AUGUST DE FONSE

George Cohen

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1979

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on *19* *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

.....

The name signed must be printed beneath

Attorney at Law